U.S. Department of Labor **Office of Administrative Law Judges**
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue date: 03Apr2002

In the Matter of	:	
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PAUL DUQUETTE	:	Case No.: 2001-LHC-00897
Claimant	:	OWCP No.: 1-148560
	:	
v.	:	
	:	
BATH IRON WORKS	:	
Employer	:	
	:	
and	:	
	:	
DIRECTOR, OFFICE OF WORKERS'	:	
COMPENSATION PROGRAMS	:	
Party-In-Interest	:	

Marcia J. Cleveland, Esq.
Topsham, ME
For the Claimant

Evan M. Hansen, Esq.
Portland, ME
For the Employer

Before: JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER

This is a claim for compensation for permanent total and permanent partial disability arising under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq*. ("the Act"). A formal hearing was held in Portland, Maine on August 6, 2001.

Claimant contends that he is entitled to compensation for permanent total disability for the periods he could not work from the date of the injury until August 28, 2001, when he was to start a job as a school bus driver, and permanent partial disability thereafter. Employer contends that claimant's disability did not become permanent until June 26, 2001, and claimant's job as a school bus driver pays less than his wage-earning capacity in other positions. Finally, the parties dispute the amount of claimant's average weekly wage at the time of the injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

a. Background

Claimant, who will be 41 years old on April 23, was a marine electrician. He graduated from High School in 1979, then went into the Air Force for four years. In the Air Force, he was trained in telephony (telephone systems). After leaving the Air Force, he worked in the electronics and telephone industries, programming robotic equipment and installing telephone systems, respectively (TR 39-40). He also worked installing cable television systems (TR 41). From observing him at the hearing, it is apparent that the claimant is a very articulate and intelligent man.

He began working for Bath Iron Works in March, 1989, as a marine electrician in the main shipyard. On October 19, 1998, claimant was working aboard a ship which was soon to be launched. Painters were painting the side of the ship with an epoxy paint. It was a windy day, and when claimant stepped out onto the O-3 level, three levels above the main deck, he was accidentally sprayed directly in the face with the epoxy paint (TR 29). He went down to first aid, was checked, and was released to return to work. The next morning he started coughing steadily, but he continued to work, and did not seek additional medical attention (*id.*).

In mid-April, 1999, claimant had a violent coughing episode while at work and felt severe pain on the left side of his chest (EX 7, at 63). He still did not go for medical treatment. However, the entire left side of his chest started turning black and blue (TR 29). Following another violent coughing episode, claimant went to the emergency room of Maine Medical Center on June 12, 1999. It was found that the claimant had a large left pleural effusion and a fracture of the left posterior eighth rib. A diagnostic thoracentesis was conducted, which showed the presence of blood in the pleural space. Further, claimant had mild anemia, which indicated that he had substantial blood loss. (EX 1-7, at 63-64). The pleural effusion was drained, and claimant was discharged from the hospital on June 14, 1999. The primary diagnosis listed on the discharge form was a left hemothorax; the associated diagnosis was left eighth rib fracture. (*Id*. at 50) Claimant took himself off from work starting June 7, 1999 (TR 5).

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[1]Citations to the record of this proceeding will be abbreviated as follows: CX – Claimant's Exhibit; EX – Employer's Exhibit; TR – Hearing Transcript.

Claimant came under the care of Charles Burns, his primary care physician, on June 28, 1999. Dr. Burns noted claimant's recent hospitalization, and stated that he had returned to work on a reduced schedule (EX 1-4, at 23). Due to claimant's large bruise on the left side and a popping noise in the left flank area, Dr. Burns suspected that the claimant might have a non-union of the broken rib. He sent claimant for another chest x-ray (*id*. at 22). Dr. Burns next saw the claimant on July 26, 1999, at which time he stated that claimant still gets short of breath easily but he has less discomfort and the clicking in his chest has decreased (*id*.). He stated claimant seemed to be improving, and was participating in activities such as a water slide. Claimant returned to work on August 2, 1999 (TR 5). On August 30, 1999, Dr. Burns stated that although claimant continued to have intermittent sharp pain and discomfort on the left side of his chest, he is not coughing or short of breath. He believed that claimant's problems were resolving (*id*. at 21). Claimant continued to have his ups and downs until the end of November, 1999, when Dr. Burns reported that claimant had worked in a very smoky area at BIW and started coughing, and his symptoms started worsening (*id*. at 17). Dr. Burns diagnosed recurrent pleuritic chest pain, and for some reason referred claimant to an orthopedic surgeon, Dr. Brown, who saw the claimant on December 28, 1999 (EX 1-3, at 12).

Dr. Brown noted the possibility that claimant's broken rib had not healed, which may be causing his problems. So he referred claimant to a thoracic surgeon, Dr. Rideout. Dr. Rideout saw the claimant for the first time on January 13, 2000, at which time he confirmed Dr. Brown's suspicion that claimant's fractured rib had not healed. He scheduled claimant for surgery at Central Maine Medical Center on January 17, 2000 for "rewiring of the costal margin ...." (EX 1-10, at 95). In his operative report, Dr. Rideout stated that claimant's eighth rib was solid, but there was a non-union of the seventh rib, and a non-union of the costal margin between the seventh and eighth ribs. Dr. Rideout wired the ribs together. Claimant went home on the day of the surgery, but did not return to work (*id*.at 91-92). Two days later, claimant developed a painful productive cough, and his surgical wound was gushing serosanguineous fluid.[2] Dr. Rideout admitted claimant to the hospital. He diagnosed "postoperative exacerbation of reactive airway disease with mucous-plugging and atelectasis and pleural effusion with associated hypoxia." (*Id*. at 90). Claimant improved rapidly following treatment, and was released from the hospital on January 20, 2000, but he developed another pleural effusion on January 28, at which time Dr. Rideout performed another thoracentesis (*id*. at 88). Claimant again seemed to improve, and on February 15, 2000 Dr. Rideout authorized claimant to return to work on March 6, 2000 without any physical restrictions (*id*. at 84-85). However, claimant testified that Dr. Rideout restricted him from working in smoke, dust or fumes (TR 30-31).

Claimant returned to work but employer failed to place him in a job which did not expose him to smoke, dust or fumes. He testified that when he would not work in the jobs to which he was assigned, he was told to stay home (TR 31). It appears that he last worked for employer on March 16, 2000.

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[2]Serosanguineous fluid is fluid containing both serum and blood. *Dorland's Illustrated Medical Dictionary* at 1512 (28th ed. 1994).

In the meantime, the employer sent claimant to Dr. Killian, a pulmonary specialist, for an evaluation for asthma. Dr. Killian diagnosed occupationally induced asthma due to work-related exposure to epoxy paint (CX 12-u, at 6; EX 1-6, at 38, 40-41). But he also believed claimant had a lung hernia, a very unusual condition where "the lung pops out through the chest wall every time he coughs." (CX 12-u, at 6). Dr. Killian believed the lung hernia occurred because the surgery performed by Dr. Rideout did not succeed, leaving a weakness in claimant's chest wall (*id*. at 9, 12). This was a life-threatening condition, because claimant's jagged ribs could rupture his lung or spleen (*id*. at *12*). Dr. Killian consulted with a distinguished retired thoracic surgeon, Dr. Grillo, and determined that the lung hernia should be surgically repaired once claimant's asthma was under control (*id*. at 7). Dr. Killian was treating claimant's asthma with a variety of medications (EX 1-6, at 37), and by October, 2000 claimant's asthma had become virtually asymptomatic (*id*. at 36).

The record contains no medical reports between October 3, 2000 and January 23, 2001. On the latter date, Dr. Wain[3] performed surgery to repair the hole in claimant's chest wall and diaphragm with a Gore-Tex patch (EX 1-8, at 73-75). In the latest report from him in the record, dated February 15, 2001, Dr. Wain indicated that claimant was doing well, and stated that he should be able to return to a normal level of work activity without restriction by April 16, 2001 (*id*. at 67). But on March 27, 2001, claimant saw Dr. Killian, who indicated that he still was experiencing pain and discomfort in his chest and had some acute exacerbation of his asthma (EX 1-6, at 35A-B). In addition, Dr. Killian noted that claimant was very depressed. Dr. Killian maintained claimant on the numerous medications he was taking to control his asthma, and also prescribed an antidepressant. Finally, Dr. Killian stated that the claimant remained temporarily disabled.

In a report of an April 6, 2001 examination, Dr. Killian stated that claimant's depression was resolving, but he was still experiencing chest pain and remained disabled. He added that claimant's "present symptoms and all intervening interventions are ultimately a result of his work-related asthma." *Id*. at 35. By the following week, Dr. Killian stated that claimant's post-operative pain was resolving, and his depression was coming under control. He stated that claimant will start exercising more. More important, he stated that claimant could return to work in a job where he is not exposed to airway irritants or sensitizers, although he cautioned that "[h]e also has a modest reduction in his overall effort tolerance and this has to be taken into account." *Id*. at 33A. Then, at his June 6, 2001 deposition, Dr. Killian initially stated that claimant should not return to work in any occupation (CX 12, Deposition of Dr. Killian at 40). However, he made it clear that this restriction was based on his belief that the success of claimant's lung hernia surgery was not known; and if claimant was released to return to work by Dr. Wain, Dr. Killian agreed that claimant could return to work as long as he avoided airborne irritants and heavy labor (*id*. at 40-42). Finally, in the latest medical report in the record, concerning a June 26, 2001 examination, Dr. Killian noted that claimant's pain in the area of the surgical repair had abated, and claimant no longer had to see the surgeon. He also stated that claimant's asthma was

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[3]Dr. Wain's name is misspelled as "Wayne" in both the hearing transcript and the transcript of Dr. Killian's deposition (CX 12u).

asymtomatic. Lastly, he again concluded that claimant could "return to work in the appropriate environment where he would be free from airway irritants and would not be expected to lift heavy objects beyond a certain 25-30 poundage." EX 1-6, at 33.

Claimant testified that he has not been offered employment in accordance with his restrictions by BIW (TR 34). He testified that he was unaware that Dr. Killian said he could return to work – subject to restrictions – until a few weeks before the hearing (TR 34). Nevertheless, he stated that he obtained a commercial driver's license in March, 2000, in preparation for returning to work in some capacity (TR 34-35, 42-43), and has obtained employment as a school bus driver beginning on August 28, 2001 (TR 36). He added that, as a full-time school bus driver for the Monmouth School District he may work as little as 25 hours a week or as much as 37 hours, or even more depending on the number of school trips and extra-curricular activities he is assigned to drive (TR 36-37, 48). He will be paid $9.40 an hour plus full benefits as a school bus driver (after an initial period during which he will be paid $10.75 an hour but will receive no benefits) (TR 11, 79). From the time he last worked in March, 2000 until he applied for the school bus driver job, claimant looked for only one other job – as a construction foreman with a firm owned by his uncle – but his uncle died and that job failed to materialize (TR 47).

On August 3, 2001, Susan McCarron, a vocational rehabilitation counselor, prepared a report of a labor market survey she conducted between July 15 and July 31, 2001 (EX 8, 10). It was Ms. McCarron's opinion that claimant had a wage-earning capacity of $400 a week in such jobs as delivery driver, vending route driver and customer service representative (TR 60-65). In arriving at this conclusion, Ms. McCarron applied the restrictions set out in Dr. Killian's June 26, 2001 report (*see* EX 8, at 110-11).

The parties agree that the claimant was out of work due to his injury from June 7, 1999 to August 1, 1999; January 19, 2000 to March 6, 2000; and March 17, 2000 to June 26, 2001.[4]

b. Discussion

1. Average Weekly Wage

For the purpose of calculating claimant's average weekly wage, both parties concede that §10(a) is applicable,[5] and that claimant earned a total of $34,078.55 in the year prior to his injury (*see*

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[4]Although the Form LS-208 attached to employer's brief states that claimant was paid compensation for temporary *partial* disability for the last two periods, the amount per week he was paid was the same that he was paid for temporary *total* disability for the first period of disability.

[5]Although claimant's counsel stated at the hearing that claimant's average weekly wage should be calculated under §10(c) of the Act, in her post-hearing brief she calculated claimant's average

CX 6). Nevertheless, their calculations of claimant's average weekly wage differ. Employer makes the fatal mistake of doing the simple, logical calculation of dividing claimant's earnings in the year prior to his injury by 52, which produces an average weekly wage of $655.36. Unfortunately for those of us who are mathematically challenged, §10(a) does not permit a claimant's average weekly wage to be calculated in such a straightforward fashion. Rather, under §10(a), once the claimant's earnings in the year prior to his injury have been ascertained, this figure must be divided by the number of days the claimant worked during that year, which produces the average daily wage. The average daily wage must then be multiplied by 260 for a five-day worker such as the claimant to provide the average annual wage. Finally, the average annual wage must be divided by 52 to provide the claimant's average weekly wage (*see* §10(d)).

At the hearing, claimant's counsel contended for the first time (*see* below) that the claimant's average weekly wage was exactly $700 (TR 5). Further, in her post-hearing brief she contends the correct figure is $715.94. She bases this amount on her representation that the claimant worked 238 days in the year prior to his injury (*Brief For Claimant* at 11). But other than a cryptic footnote which explains nothing, she provides no explanation for her conclusion that claimant worked 238 days in the year prior to his injury.

Since neither party's average weekly wage calculations are useful, I made an independent calculation of claimant's average weekly wage. Since the record establishes that claimant earned $34,078.55 in the year prior to his injury, §10(a) requires that I next had to determine the number of days that claimant worked in the year prior to his injury. This would seem to be relatively simple, since claimant worked for only a single employer during that period, but the record does not contain claimant's daily time sheets. Instead, only claimant's weekly hours are listed (*see* CX 6). Further, at the hearing, claimant was barely questioned regarding his work schedule in the applicable year. Since all I had to work with were claimant's weekly hours, I had to make several assumptions to determine the number of days claimant worked in a given week:

> –Where the number of hours worked in a week were exactly divisible by 8, I assumed that the quotient was the number of days worked in that week (16 hours equals 2 days, 48 hours equals 6 days, etc.).
>
> – Where the claimant worked more than 32 hours in a week but less than 40, I found
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> that the claimant worked 4 days in those weeks, assuming that the hours in excess of 32 were overtime rather than part of a fifth workday.

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weekly wage using §10(a). Since claimant worked the entire year prior to the injury in the same position for the same employer, it is clear that §10(a) must be used here to calculate claimant's average weekly wage.

– Where the claimant worked more than 40 hours in a week but less than 48, I found that the claimant worked 5 days in those weeks, assuming that the hours in excess of 40 were overtime rather than part of a sixth workday.

– Where the claimant worked more than 48 hours in a week, I assumed that the claimant worked 6 days in those weeks, assuming that the hours in excess of 48 were additional overtime on the six days worked rather than part of a seventh workday.

Applying these assumptions to the weekly hours listed on claimant's wage statement (CX 6), I concluded that the claimant worked on 228 days in the year prior to his injury. Dividing claimant's yearly earnings of $34,078.55 by 228 resulted in an average daily wage of $149.47. When this is multiplied by 260, claimant's average annual earnings total $38,861.50. Finally, dividing $38,861.50 by 52 results in an average weekly wage of $747.34.

Despite determining that claimant's average weekly wage would be $747.34 if I applied my calculations, I nevertheless find, for the purposes of awarding compensation to the claimant, that his average weekly wage is $700. For one thing, although I believe my calculations are reasonable considering the record on which they were based, it is surely possible that claimant worked on more than the 228 days that I found; and if claimant worked on 243 days instead of 228, his average weekly wage would come out to about $700. It must be kept in mind that it is the claimant's burden to establish his average weekly wage. If the evidence regarding his earnings is incomplete, and is incomplete not because better evidence was unavailable but because it simply was not produced, the claimant should not profit from failing to make an adequate record.

In addition, the employer was surprised at the hearing that claimant was alleging the average weekly wage was more than $655.36. Employer contended at the hearing – without contradiction by the claimant – that this was the average weekly wage proposed by the claimant at the informal conference (TR 23-24). Nevertheless, although he disputed claimant's contention that his average weekly wage was $700, employer's counsel did not object to claimant raising the issue at the hearing. But since $700 is the average weekly wage claimant asked for at the hearing, and this amount was already significantly higher than the average weekly wage claimant was seeking prior to the hearing, it would be unfair to the employer for me to impose an even higher average weekly wage, particularly one whose accuracy cannot be assured.

Accordingly, I find that claimant's average weekly wage is $700.

2. Nature and extent of disability

Claimant contends that since his asthma is a permanent condition, he is entitled to compensation for permanent disability from the date of injury. If having an injury that causes permanent damage to the body was the only criterion to be considered in determining whether a claimant's disability is permanent rather than temporary, then claimant would be right. But if that was the case, then virtually all serious

injuries would be considered permanent from the date of injury. As claimant's counsel well knows, the Act has not been interpreted in that way; and other things go into the determination of when a claimant's disability becomes permanent.

A permanent disability is one which has continued for a lengthy period and appears to be of lasting and indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp*., 400 F.2d 649 (5th Cir. 1968). An employee is considered permanently disabled if he or she has any residual disability after reaching maximum medical improvement, the date of which is determined solely by medical evidence. *Trask v. Lockheed Shipbuilding and Constr. Co.*, 17 BRBS 56, 61 (1985). A claimant reaches maximum medical improvement when he or she has received the maximum benefit of medical treatment, *i.e*., where the employee is no longer undergoing treatment with a view towards improving his or her condition. *Sketoe v. Dolphin Titan International*, 28 BRBS 212, 221 (1994); *Ballesteros v. Willamette W. Corp*., 20 BRBS 184 (1988).

I find that claimant reached maximum medical improvement on April 16, 2001. In his February 15, 2001 note, Dr. Wain indicates that by April 16, 2001 the claimant would have fully recovered from the surgery to his chest and "he should be able to return to a normal level of work activity without restriction." CX 13-g. In his April 13, 2001 report, Dr. Killian, considering all of claimant's medical and psychological problems, states that the claimant can return to work (CX 12-s). Although Dr. Killian, contrary to his report of April 13, 2001, indicates at his June 8, 2001 deposition that claimant should not return to work at that time, he based this conclusion on his lack of knowledge of whether claimant's lung hernia surgery was successful (CX 12-u, deposition transcript at 40-42). But Dr. Wain, who performed the surgery, had already released claimant to return to work, indicating that he believed the surgery had been successful. Accordingly, claimant reached maximum medical improvement on April 16, 2001, and that is the date his condition became permanent.

Once the nature of claimant's disability is determined, the extent of his disability must be established. To establish a prima facie case of total disability, claimant must show that he cannot return to his regular and usual employment due to his work-related injury. *Trans- State Dredging v Benefit Review Board***,** 731 F.2d 199, 16 BRBS 74 (CRT) (4th Cir. 1984). A claimant's usual employment is the claimant's job at the time he was injured. It is undisputed that the claimant cannot return to this job. Therefore, I find that claimant has established a prima facie case of total disability.

Once the claimant establishes a prima facie case of total disability, the burden shifts to the employer to establish suitable alternative employment. In the First Circuit, the severity of the employer's burden is dependent upon the facts of the specific case. *See Air America, Inc. v Director***,** OWCP, 597 F.2d 773, 779, 10 BRBS 505, 513 (Ist Cir. 1979). Where the "claimant's medical impairment affects only a specialized skill that is necessary in his former employment, his resulting inability to perform that work does not necessarily indicate an inability to perform other work, not requiring that skill, for which his education and work experience qualify him." *Id.* In such a situation, an employer is not required to demonstrate specific alternative job opportunities. *Id*. Alternatively, if the claimant's

medical impairment and job qualifications render him or her capable of performing "only a special and limited class of work," then the employer must present proof of actual employment opportunities. *Id*. at 779-80. It is also important to note that the determination of the extent of claimant's disability must be based on his vocational capabilities at the time of the hearing. *Hayes v P & M Crane Co*., 23 BRBS 389 (1990), vacated on other grounds, 24 BRBS 116 (CRT) (5th Cir. 1991).

There is no contention that the claimant can return to his previous job at BIW. Moreover, his injuries preclude him from working at a broad range of jobs. Accordingly, the burden is on the employer to establish that the claimant is not totally disabled. There is no evidence in the record that jobs were available to the claimant prior to the labor market survey performed by Ms. McCarron. Therefore, claimant was totally disabled from April 16 to at least August 3, 2001. Employer contends that, based on the labor market survey, claimant has a post-injury wage-earning capacity of $400 a week, whereas claimant contends that his wage-earning capacity should be computed based on his wages as a school bus driver. Claimant contends that these wages, based on a wage rate of $9.40 an hour for a 25-hour week, equal only $235 a week.

I have problems with both parties' positions. In regard to the claimant, he is contending that his wage-earning capacity should be based on his working only 25 hours a week, the least number of hours that he could work as a school bus driver. But based on claimant's testimony, it seems likely that he will be working more than 25 hours a week.[6] In regard to the employer's position, the labor market survey performed by Ms. McCarron contains little probative evidence. It lists several jobs which are beyond claimant's capacity and others where he does not meet the requirements. Ms. McCarron did not know what some of the jobs paid, and in other cases the jobs probably were located more than an hour's commute from claimant's residence. Ms. McCarron testified that she believes commutes of over an hour are excessive (TR 82-83). Further, she did not visit any of the work sites listed in the labor market survey, and had not met the claimant prior to the hearing.

By way of example, one job she stated is particularly appropriate for the claimant is a service/sales rep position with Northland Telephone Co. However, she acknowledged that claimant did not meet the job requirement of two to three years related experience in a call-center environment. Moreover, she did not know what the job paid. *See* TR 60-61; EX 8, at 114. A driving job at CDS Delivery required lifting up to 50-60 pounds; a lab tech aide job at St. Mary's Regional Medical Center required lifting of 50 pounds; an optical lab inspector job would expose the claimant to airborne residue; and a machinist position at Lanco Assembly Systems might expose claimant to excessive dust. EX 8, at 114-16. None of these jobs meet claimant's restrictions. Another job, as a hospitality associate, required the exertion of push/pull force up to 50 pounds (EX 8, at 116). Ms. McCarron could not say whether this exceeds claimant's restrictions, noting that there is a difference between lifting and push/pull (TR 76). Further, Ms. McCarron did not know what the optical lab inspector and

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[6]It is interesting that neither party has moved to supplement the record with evidence of claimant's actual earnings as a school bus driver.

the machinist jobs paid (TR 63; EX 8, at 115-16). Ms. McCarron also stated that there were 12 driving jobs open at Custom Coach and Limousine in Portland which paid $10-11 an hour (TR 64). But claimant testified that it normally takes him 55 to 70 minutes to drive to Portland from his home in Monmouth; it took him an hour and a half to drive from his home to the site of the hearing, which was on the outskirts of Portland, adjacent to Exit 8 of the Maine Turnpike (TR 83-86). Ms. McCarron also located two driver jobs, and a pharmacy technician position, which were listed by an employment agency, Employment One (TR 64, 71-72). But the employment agency would not give her any specific information about these jobs, so it is impossible to tell if they would have been suitable for the claimant. Ms. McCarron testified that in concluding that the claimant had a wage-earning capacity of $400 a week, she relied on the jobs at Custom Coach and Limousine, those listed by Employment One, the service/sales rep job at Northland Telephone, the CDS Delivery job, and plant technician jobs at Tambrands, a company which makes feminine hygiene products (TR 75,78). But as is stated above, the jobs at Northland Telephone and CDS Delivery do not fall within claimant's restrictions; and there is insufficient information about the jobs at Custom Coach and Limousine and Employment One to determine if they are suitable for him. Finally, Ms. McCarron could not state with assurance that the jobs at Tambrands would not expose claimant to airborne irritants (TR 75). What is more, she does not describe jobs which may have been available at Tambrands with any specificity. Accordingly, the labor market survey provides no credible basis to conclude that the claimant has a wage-earning capacity of $400 a week.

The remaining jobs discussed in the labor market survey either are at wage rates which provide a wage-earning capacity no higher than the claimant's wages as a school bus driver working 25 hours a week, *e.g.*, the jobs with FISC and Gray Birch Nursing Care Facility (EX 8, at 113-15); or do not contain a wage rate, *e.g.*, desk clerk positions at the Comfort Inn (*id*. at 115). In short, there is not a single job listed in the labor market survey which is both suitable for the claimant and at which he would be paid more than he should be earning in his position as a school bus driver.[7]

Although the claimant testified that he is only guaranteed 25 hours a week as a school bus driver, he stated that '[t]here is more than adequate opportunities to get my hours up." (TR 37). Since it is therefore likely that claimant will work more than the minimal number of hours, I find that his wage-earning capacity as a school bus driver should be based on working 30 hours a week, not 25. At $9.40 an hour, this provides a weekly wage-earning capacity of $282 beginning on August 28, 1991.

In accordance with §908(c)(21) and 8(h), Claimant's wage earning capacity must be calculated to reflect his wage earning capacity at the time of his injury. *See Bethard v. Sun Shipbuilding and Dry Dock Co.*, 12 BRBS 691 (1980). Claimant was injured in October 1998. In that month, the National

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[7]I have not considered any of the Career Center listings appended to the labor market survey (EX 8, at 118-23), since Ms. McCarron did not contact any of these employers and the listings are sketchy. Further, Ms. McCarron did not indicate that she relied on them in concluding that the claimant had a wage-earning capacity of $400 a week.

Average Weekly Wage was $435.88. In August 2001, when claimant returned to work after his disability became permanent, the National Average Weekly Wage was $466.91. The October 1998 National Average Weekly Wage is 93.3% of the August 2001 National Average Weekly Wage. Claimant's weekly wage-earning capacity in August 2001 was $282.00. This number should be multiplied by .933 to reflect the difference in the National Average Weekly Wage between October 1998 and August 2001. After performing this calculation, claimant's post-injury wage-earning capacity equals $263.11. Thus, from August 28, 2001 on, claimant is entitled to compensation for a loss of wage-earning capacity based on the difference between $700.00, his average weekly wage at the time of the injury, and $263.11, his current wage-earing capacity reduced to October 1998 dollars, which equals $436.89.

c. *Attorney' s Fee*

Claimant's counsel has filed a petition requesting an attorney's fee of $8,744.65. That amount is comprised of 39.71 hours of claimant's counsel's time billed at $185.00 an hour, 18.8 hours of paralegals' time billed at $45.00 an hour, and $552.30 in expenses. Employer shall file any objections it may have to the fee petition within 15 days of its receipt of this decision.

ORDER

IT IS ORDERED that employer shall pay to the claimant:

1. Compensation for temporary total disability from June 7, 1999 to August 2, 1999, January 19, 2000 to March 7, 2000, and from March 17, 2000 to April 15, 2001, and for permanent total disability from April 16, 2001 to August 27, 2001, based on an average weekly wage of $700.00;

2. Compensation for permanent partial disability from August 28, 2001 and continuing based on a loss of wage-earning capacity of $436.89;

3. Medical benefits resulting from the injury of October 19, 1998; and

4. Interest on all unpaid compensation from the date due until paid in accordance with 28 U.S.C. §1961(a).

Employer shall receive credit for all previous payments of compensation and medical benefits.

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JEFFREY TURECK
Administrative Law Judge